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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,051	12/01/2003	Clarence Thibeau	03214	2968

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EXAMINER

LAUX, JESSICA L

ART UNIT PAPER NUMBER

3635

DATE MAILED: 05/30/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/725,051	THIBEAU, CLARENCE	
	<b>Examiner</b>	<b>Art Unit</b>	
	Jessica Laux	3635	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 27 April 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) 12-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 and 15-18 is/are rejected.
- 7) ☒ Claim(s) 4 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 December 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. _____  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>03/29/2004</u> .  | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election without traverse of Species III in the reply filed on April 27, 2006 is acknowledged.

Claims 12-14 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on April 27, 2006.

In the office action dated 03/28/2006 a sub-species election requirement of Species IV or V was made. Upon further examination the examiner determines said election requirement to be incorrect and therefore withdraws the sub species election requirement for Species IV and V. Claims 1-11 and 15-18 are relevant to Species III as applicant has elected and indicated in the reply filed April 27, 2006 and therefore those claims will be examined in this office action.

### ***Claim Objections***

Claim 4 is objected to because of the following informalities: Line 2 recites, "...is t least...", examiner suggest correcting line 2 to recited "...is at least...." Appropriate correction is required.

***Claim Rejections - 35 USC § 102***

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4 and 6-11 are rejected under 35 U.S.C. 102(b) as being anticipated by Allen (5256007).

In regards to claim 1: Allen discloses a spacer capable of providing spacing between an outer wall surface of a building under construction and an exterior cladding material, the spacer comprising: an apertured planar surface (16 and Abstract lines 9-10) capable of attachment to a surface of the exterior cladding material to maintain said cladding material in spaced relationship to the outer wall surface; and a plurality of mutually spaced protrusions (20 and Abstract lines 6-8) of substantially uniform height depending from one side (18) of said apertured surface, the apices of at least some of said protrusions forming a protrusion plane, the protrusion plane being capable of attachment to the outer wall surface of the building; whereby, when the spacer is in place, liquid and air may pass through channels formed among the protrusions to facilitate air circulation and liquid drainage.

In regards to claim 2: The spacer according to claim 1 above, wherein said protrusions depend from said apertured planar surface at least approximately perpendicularly (Figure 1).

In regards to claim 3: The spacer according to claim 1 above, wherein said protrusions are of like dimensions, terminating to form said protrusion plane (Figure 1 and Col. 4, lines 8-9).

In regards to claim 4: The spacer according to claim 1 above, wherein said protrusion plane is at least substantially parallel to said apertured plane (Figure 1).

In regards to claim 6: The spacer according to claim 1 above, wherein said apertured surface comprises greater aperture surface areas than matter surface areas (Figure 2, where the apertured surface includes apertures 22 and the protrusion opening aperture).

In regards to claim 7: The spacer according to claim 1 above, wherein the apertures of the apertured surface are of a repeating pattern over at least substantially the entire spacer (Figure 2).

In regards to claim 8: The spacer according to claim 1 above, wherein said protrusions are of a repeating pattern over at least substantially the entire surface of the spacer (Figure 2).

In regards to claim 9: The spacer according to claim 1 above, wherein the apertures are selected from a shape of the group consisting of: diamond, circular, square, rectangular, oval and quadrilateral (Figures 1 and 2 where the apertures are circular).

In regards to claim 10: The spacer according to claim 1 above, wherein said protrusions are selected from a shape of the group consisting of: pyramidal, flat topped pyramidal, conical, flat topped conical, rectangular based pyramid, cuboid and rectangular block (Figures 1 and 2; Col. 4, line 9).

In regards to claim 11: The spacer according to claim 1 above, wherein the spacer is made by at least one of: injection moulding, pouring moulding, extrusion or

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stamping. It should be noted that claim 11 is considered a product-by-process claim.

The patentability of the product does not depend on its method of production.

Determination of patentability is based on the product itself. See MPEP 2113. If the product-by-process claim is the same as or obvious from a product of the same prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed.Cir.1985). In this case the spacer of Allen is made of plastic and injection moulding, pouring moulding are obvious methods of producing a plastic product.

Claims 1 and 15-18 are rejected under 35 U.S.C. 102(b) as being anticipated by Coulton (20010054263).

In regards to claim 1: Coulton discloses an air gap spacer for providing spacing between an outer wall surface of a building under construction and an exterior cladding material, the air gap spacer comprising: an apertured planar surface (Figure 3, looking down from the top view there is a surface with apertures therein) capable attachment to a surface of the exterior cladding material to maintain said cladding material in spaced relationship to the outer wall surface; and a plurality of mutually spaced protrusions (30) of substantially uniform height depending from one side of said apertured surface, the apices of at least some of said protrusions forming a protrusion plane, the protrusion plane being capable of attachment to the outer wall surface of the building; whereby, when the spacer is in place, liquid and air may pass through channels formed among the protrusions to facilitate air circulation and liquid drainage.

In regards to claim 15: The air gap spacer according to claim 1 above, wherein the air gap spacer is adapted to be secured to the surface of the building being constructed by way of securing means selected from the group consisting of tacks, nails and screws (paragraph 0027 lines 1-3).

In regards to claim 16: The air gap spacer according to claim 1 above, wherein the air gap spacer comprises a plurality of mounting holes therein (36), whereby securing means may be placed therethrough for attaching the spacer to the surface of the building being constructed.

In regards to claim 17: The air gap spacer according to claim 1 above, wherein the exterior cladding material is one of: siding, shingles (Paragraph 0028 line 3), brick and clapboard.

In regards to claim 18: An air gap spacer according to claim 1, wherein the spacer is made of a material selected from the group consisting of plastic, metal, aluminum, and pressed wood particle product (paragraph 0014 lines 4-6).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Allen (5256007).

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In regards to claim 5: The spacer according to claim 1 above, wherein Allen discloses an apertured surface comprising an aperture surface area greater than matter surface area. Allen does not disclose the spacer having an apertured surface comprises aperture surface areas and matter surface area of similar magnitudes. At the time the invention was made, it would have been an obvious matter of design choice to a person of ordinary skill in the art to have the aperture surface area similar to the matter surface area because applicant has not disclosed that provides an advantage, is used for a particular purpose, or solves a stated problem. One of ordinary skill in the art, furthermore, would have expected Allens spacer and applicant's invention, to perform equally well with either the aperture and matter surface area taught by Allen or the claimed aperture and matter surface areas because both would perform the same function, further applicant discloses on page 7 of the specification that the apertured surface may comprise aperture surface areas and matter surface ear of similar magnitudes or the apertured surface may comprise great aperture surface areas than matter surface areas. Therefore, it would have been prima facie obvious to modify Allen to obtain the invention as specified in claim 5 because such a modification would have been considered a mere design consideration which fails to patentably distinguish over the prior art of Allen.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jessica Laux whose telephone number is 571-272-



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8228. The examiner can normally be reached on Monday thru Friday, 8:30am to 4:00pm (est).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl Friedman can be reached on 571-272-6842. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



JL  
05/18/2006

  
N. Slack  
Primary